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PART III: CHAPTER 1

Glossary of Terms & Techniques

Alternative Dispute Resolution (ADR)

Any procedure involving a neutral that is used as an alternative to trial to resolve one or more issues in controversy. It includes but is not limited to the following ADR techniques: *mediation, early neutral case evaluation, mini-trial, summary bench trial, summary jury trial, and arbitration.*

Arbitration

The most traditional form of private dispute resolution. A process where one or more arbitrators issue a judgment (binding or non-binding) on the merits after an expedited adversarial hearing. The formality varies and may involve presentation of documents and witnesses or simply a summary by counsel. A decision is rendered that addresses liability and damages, if necessary. It can take any of the following forms: *binding, non-binding, "baseball" or "final-offer", "bounded" or "high-low", incentive.*

Baseball Arbitration

In this process, used increasingly in commercial disputes, each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator chooses one award without modification. This approach imposes limits on the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal, in the hope that it will be accepted by the decision-maker. A related variation, referred to as "night baseball" arbitration, requires the arbitrator to make a decision without the benefit of the parties' proposals and then to make the award to the party whose proposal is closest to that of the arbitrator.

Binding Arbitration

A private adversarial process in which the disputing parties choose a neutral person or a panel of three neutrals to hear their dispute and to render a final and binding decision or award. The process is less formal than litigation; the parties can craft their own procedures and determine if any formal rules of evidence will apply. Unless there has been fraud or some other defect in the arbitration procedure, binding arbitration awards typically are enforceable by courts and not subject to appellate review. In order for the government to use binding arbitration, it must follow special procedures set forth in the Administrative Dispute Resolution Act, 5 U.S.C. " 571-584.

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Bounded Arbitration

The parties agree privately without informing the arbitrator that the arbitrator's final award will be adjusted to a bounded range. Example: P wants \$200,000. D is willing to pay \$70,000. Their high-low agreement would provide that if the award is below \$70,000, D will pay at least \$70,000; if the award exceeds \$200,000, the payment will be reduced to \$200,000. If the award is within the range, the parties are bound by the figure in the award.

Co-Med-Arb

Addresses a problem that may occur in *med-arb*, in which a party may not believe that the arbitrator will be able to discount unfavorable information learned in mediation when making the arbitration decision. In co-med-arb two different people perform the roles of mediator and arbitrator. Jointly, they preside over an information exchange between the parties, after which the mediator works with the parties in the absence of the arbitrator. If mediation fails to achieve a settlement, the case (or any unresolved issues) can be submitted to the arbitrator for a binding decision.

Conciliation

Conciliation involves building a positive relationship between parties to a dispute. Often used interchangeably with *mediation*, as a method of dispute settlement whereby parties clarify issues and narrow differences through the aid of a neutral facilitator. A conciliator may assist parties by helping to establish communication, clarifying misperceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Some of the techniques used by conciliators include providing for a neutral meeting place, carrying initial messages between/among the parties, reality testing regarding perceptions or misperceptions, and affirming the parties' abilities to work together. Since a general objective of conciliation is often to promote openness by the parties, this method allows parties to begin dialogues, get to know each other better, build positive perceptions, and enhance trust.

Confidential Listener

The parties submit their confidential settlement positions to a third-party neutral, who without relaying one side's confidential offer to the other, informs them whether their positions are within a negotiable range. The parties may agree that if the proposed settlement figures overlap, with the plaintiff citing a lower figure, they will settle at a level that splits the difference. If the proposed figures are within a specified range of each other (for example 10 percent), the parties may direct the neutral to so inform them and help them negotiate to narrow the gap. And if the submitted numbers are not within the set range, the parties might repeat the process.

**Consensus Building or
Census Process**

A procedure used in ADR processes such as negotiation, facilitation, or mediation. By bringing all affected parties (the stakeholders) into the process as early as possible, the consensus-building procedure has been effective in resolving major multiparty, multi-agency, multi-government problems. The mediators in this form may take a proactive role in defining the stakeholders; getting stakeholders to agree to the mediation effort; guiding the process; and upon reaching resolution, administering the process of documentation by getting the final approval and signatures from authorized decisionmakers.

Convening

Helps to identify issues in controversy and the affected interests. The convener, usually a neutral party, generally determines whether direct negotiations among the parties would be a suitable means to resolve the issues; educates the parties about the dispute resolution process; and brings the parties together to determine negotiating ground rules.

**Cooperative Problem-
Solving**

This informal process usually does not use the services of a third party and typically takes place when the concerned parties agree to resolve a question or issue of mutual concern. It is a positive effort by the parties to collaborate rather than compete to resolve a dispute. Cooperative problem-solving may be the procedure of first resort when the parties recognize that a problem or dispute exists and that they may be affected negatively if the matter is not resolved. It is most commonly used when a conflict is not highly polarized and prior to the parties forming "hard line" positions. This method is a key element of labor-management cooperation programs.

**Court-Annexed
Arbitration**

An adjudicatory dispute-resolution process in which one or more arbitrators issue a non-binding judgment on the merits, after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial.

Court-Annexed Mediation

In mediation, a neutral third party the mediator facilitates negotiations among the parties to help them settle. The mediation session is confidential and informal. Disputants clarify their understandings of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. The mediator, who may meet jointly or separately with the parties, serves solely as a facilitator and does not issue a decision or make findings of fact.

Dispute Panels

Use one or more neutral or impartial individuals who are available to the parties as a means to clarify misperceptions, fill in information

gaps, or resolve differences over data or facts. The panel reviews conflicting data or facts and suggests ways for the parties to reconcile their differences. These recommendations may be procedural in nature or they may involve specific substantive recommendations, depending on the authority of the panel and the needs or desires of the parties. Information analyses and suggestions made by the panel may be used by the parties in other processes such as negotiations. This method is generally an informal process and the parties have considerable latitude about how the panel is used. It is particularly useful in those organizations where the panel is non-threatening and has established a reputation for helping parties work through and resolve their own disputes short of using some formal dispute resolution process.

Early Neutral Case

A conference where the parties and their counsel present the factual and legal bases of their case and receive a non-binding assessment by an experienced neutral with subject-matter expertise and/or with significant trial experience in the jurisdiction. This assessment can form the basis for settlement discussions facilitated by the evaluator if the parties so choose. Early neutral evaluation is appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases and when the top decision makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. Finally, it is used when the parties are seeking an alternative to the expensive and time-consuming process of following discovery procedures.

Facilitation

Involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute). The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter. The facilitator generally works with all of the meeting's participants at once and provides procedural directions as to how the group can move efficiently through the problem-solving steps of the meeting and arrive at the jointly agreed upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural assistance and remain impartial to the topics or issues under discussion. The method of facilitating is most appropriate when:

- (1) the intensity of the parties' emotions about the issues in dispute are low to moderate;
- (2) the parties or issues are not extremely polarized;
- (3) the parties have enough trust in each other that they can work together to develop a mutually acceptable solution; or
- (4) the parties are in a common predicament and they need or will benefit from a jointly-acceptable outcome.

Fact-Finding

An investigation of a dispute by an impartial third person who examines the issues and facts in the case, and may issue a report and recommended settlement. A process by which the facts relevant to a controversy are determined. Fact-finding is a component of other ADR procedures, and may take a number of forms.

In *neutral fact-finding*, the parties appoint a neutral third party to perform the function, and typically determine in advance whether the results of the fact-finding will be conclusive or advisory only.

With *expert fact-finding*, the parties privately employ neutrals to render expert opinions that are conclusive or nonbinding on technical, scientific or legal questions. In the latter, a former judge is often employed.

Federal Rules of Evidence 706 gives courts the option of appointing *neutral expert fact-finders*. And while the procedure was rarely used in the past, courts increasingly find it an effective approach in cases that require special technical expertise, such as disputes over high-technology questions. The neutral expert can be called as a witness subject to cross-examination.

In *joint fact-finding*, the parties designate representatives to work together to develop responses to factual questions.

Final Offer Arbitration

See *Baseball Arbitration*.

Hearings

In the ADR sense, formal dispute resolution forums in which a "hearings" officer is designated by appropriate administrative authority such as a city ordinance or Federal statute. This differs from the formal hearings before an administrator or administrative law judge in formal administrative adjudication forums.

High-Low

See *Bounded Arbitration*.

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Incentive Arbitration	In non-binding arbitration, the parties agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, and fails to improve his position by some specified percentage or formula. Penalties may include payment of attorneys' fees incurred in the litigation.
Interest-Based Problem-Solving	A technique that creates effective solutions while improving the relationship between the parties. The process separates the person from the problem, explores all interests to define issues clearly, brainstorms possibilities and opportunities, and uses some mutually agreed upon standard to reach a solution. Trust in the process is a common theme in successful interest-based problem-solving. Interest-based problem-solving is often used in collective bargaining between labor and management in place of traditional, position-based bargaining. However, as a technique, it can be effectively applied in many contexts where two or more parties are seeking to reach agreement.
Judge-Hosted Settlement Conferences	The most common form of ADR used in federal and state courts is the settlement conference presided over by a judge or magistrate judge. The settlement judge articulates judgements about the merits of the case and facilitates the trading of settlement offers. Some settlement judges and magistrate judges also use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and assist in formulating resolutions.
Last-Offer Arbitration (Baseball)	Parties negotiate to the point of impasse, then respectively submit a final offer to the arbitrator whose sole responsibility is to select one or the other.
Mediation	The intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority. The objective of this intervention is to assist the parties in voluntarily reaching an acceptable resolution of issues in dispute. Mediation is useful in highly-polarized disputes where the parties have either been unable to initiate a productive dialogue, or where the parties have been talking and have reached a seemingly insurmountable impasse. A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to

resolution. Mediators differ in their degree of directiveness or control while assisting disputing parties. Some mediators set the stage for bargaining, make minimal procedural suggestions, and intervene in the negotiations only to avoid or overcome a deadlock. Other mediators are much more involved in forging the details of a resolution. Regardless of how directive the mediator is, the mediator performs the role of catalyst that enables the parties to initiate progress toward their own resolution of issues in dispute.

Meditation-Arbitration

Commonly known as "med-arb," a variation of the *arbitration* procedure in which an impartial or neutral third party is authorized by the disputing parties to mediate their dispute until such time as they reach an impasse. As part of the process, when impasse is reached, the third party is authorized by the parties to issue a binding opinion on the cause of the impasse or the remaining issue(s) in dispute. In some cases, med-arb utilizes two outside parties--one to mediate the dispute and another to arbitrate any remaining issues after the *mediation* process is completed. This is done to address some parties' concerns that the process, if handled by one third party, mixes and confuses procedural assistance (a characteristic of mediation) with binding decision making (a characteristic of arbitration). The concern is that parties might be less likely to disclose necessary information for a settlement or are more likely to present extreme arguments during the mediation stage if they know that the same third party will ultimately make a decision on the dispute. Mediated arbitration is useful in narrowing issues more quickly than under arbitration alone and helps parties focus their resources on the truly difficult issues involved in a dispute in a more efficient and effective manner.

Mini-Trial

A non-binding hearing, generally reserved for complex cases, in which counsel for each party informally presents a shortened form of its case to settlement-authorized representatives of the parties in the presence of a presiding judge, magistrate judge, or other neutral, at the conclusion of which the representatives meet, with or without the judge or neutral, to negotiate a settlement.

Multidoor Courthouse or Multi-Option ADR

This term describes courts that offer an array of dispute resolution options or screen cases and then channel them to particular ADR methods. Some multidoor courthouses refer all cases of certain types to particular ADR programs, while other offer litigants a menu of options in each case.

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Multiparty Coordinated Defense	A coordinated joint defense strategy in which a neutral facilitator helps multiple defendants negotiate, organize, and manage cooperative joint-party arrangements that are ancillary to the main dispute. In the process, they streamline the steps toward resolution. Coordinated defense efforts include agreements to: limit infighting among defendants; use joint counsel and experts. Assign and share discovery and research tasks; coordinate and share the results of procedural maneuvers; and apportion liability payments, should they be imposed.
Multi-Step	Parties may agree, either when a specific dispute arises, or earlier in a contract clause, to engage in a progressive series of dispute resolution procedures. One step typically is some form of negotiation, preferably face-to-face between the parties. If unsuccessful, a second tier of negotiation between higher levels of executives may resolve the matter. The next step may be mediation or another facilitated settlement effort. If no resolution has been reached at any of the earlier stages, the agreement can provide for a binding resolution through arbitration, private adjudication or litigation.
Negotiated Rule-Making	Also known as regulatory negotiation, this ADR method is an alternative to the traditional approach of U.S. government agencies to issue regulations after a lengthy notice and comment period. In reg-neg, as it is called, agency officials and affected private parties meet under the guidance of a neutral facilitator to engage in joint negotiation and drafting of the rule. The public is then asked to comment on the resulting, proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule.
Negotiation	A process by which disputants communicate their differences to one another through conference, discussion and compromise, in order to resolve them.
Non-binding Arbitration	This process works the same way as binding arbitration except that the neutral's decision is advisory only. The parties may agree in advance to use the advisory decision as a tool in resolving their dispute through negotiation or other means.
Ombudsperson	Individuals who rely on a number of techniques to resolve disputes. These techniques include counseling, mediating, conciliating, and fact-finding. Usually, when an ombudsman receives a complaint, he or she interviews the parties, reviews files, and makes recommendations to the disputants. Typically, ombudsmen do not impose solutions. The

power of the ombudsman lies in his or her ability to persuade the parties involved to accept his or her recommendations. Generally, an individual not accepting the proposed solution of the ombudsman is free to pursue a remedy in other forums for dispute resolution. Ombudsmen may be used to handle employee workplace complaints and disputes or complaints and disputes from outside of the place of employment, such as those from customers or clients. Ombudsmen are often able to identify and track systemic problems and suggest ways of dealing with those problems.

Partnering

Used to improve a variety of working relationships, primarily between the Federal Government and contractors, by seeking to prevent disputes before they occur. The method relies on an agreement in principle to share the risks involved in completing a project and to establish and promote a nurturing environment. This is done through the use of team-building activities to help define common goals, improve communication, and foster a problem-solving attitude among the group of individuals who must work together throughout a contract's term. Partnering in the contract setting typically involves an initial partnering workshop after the contract award and before the work begins. This is a facilitated workshop involving the key stakeholders in the project. The purpose of the workshop is to develop a team approach to the project. This generally results in a partnership agreement that includes dispute prevention and resolution procedures.

Peer Review

A problem-solving process where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. The decision may or may not be binding on the employee and/or the employer, depending on the conditions of the particular process. If it is not binding on the employee, he or she would be able to seek relief in traditional forums for dispute resolution if dissatisfied with the decision under peer review. The principle objective of the method is to resolve disputes early before they become formal complaints or grievances. Typically, the panel is made up of employees and managers who volunteer for this duty and who are trained in listening, questioning, and problem-solving skills as well as the specific policies and guidelines of the panel. Peer review panels may be standing groups of individuals who are available to address whatever disputes employees might bring to the panel at any given time. Other panels may be formed on an ad hoc basis through some selection process initiated by the employee, e.g., blind selection of a certain number of names from a pool of qualified employees and managers.

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Pre-dispute ADR Contract Clause	A clause included in the parties' agreement to specify a method for resolving disputes that may arise under that agreement. It may refer to one or more ADR techniques, even naming the third party that will serve as an arbitrator or mediator in the case.
Pre-negotiation	The process of preparing for negotiation. It includes assessing the conflict and designing the process as well as anything else necessary to bring disputing parties together to begin resolving their differences. May be used interchangeably with <i>convening</i> .
Private Judges or Rent-A-Judge	A fairly new innovation by some private dispute resolution firms and some courts. Retired judges typically are used to hear these cases which would have been taken to real court, and the parties agree in advance to accept the decision as if it were a real court decision. The advantages of this process are speed, privacy, and the ability of the parties to select a judge with expertise in the disputed matter.
Settlement Conferences	Involve a pre-trial conference conducted by a settlement judge or referee and attended by representatives for the opposing parties (and sometimes attended by the parties themselves) in order to reach a mutually acceptable settlement of the matter in dispute. The method is used in the judicial system and is a common practice in some jurisdictions. Courts that use this method may mandate settlement conferences in certain circumstances. The role of a settlement judge is similar to that of a mediator in that he or she assists the parties procedurally in negotiating an agreement. Such judges play much stronger authoritative roles than mediators, since they also provide the parties with specific substantive and legal information about what the disposition of the case might be if it were to go to court. They also provide the parties with possible settlement ranges that could be considered.
Settlement Judges	Serve essentially as mediators or neutral evaluators in cases pending before a tribunal. The settlement judge is usually a second judge from the same body as the judge who will ultimately make the decision if the case is not resolved by the parties. Magistrates in the Federal court system often serve as settlement judges and may compel attendance of senior officials and business heads who have decisionmaking authority.
Stakeholders	All the individuals, organizations, businesses, and institutions - public and private - that have standing and will be affected by decisions related to an issue in controversy.

Summary Bench Trial

A pretrial procedure used in non-jury cases intended to facilitate settlement, consisting of a summarized presentation of a case to a Judicial Officer whose decision and subsequent factual and legal analysis serves as an aid to settlement negotiations.

Summary Jury Trial

A flexible non-binding procedure, usually reserved for trial-ready cases in which protracted jury trials are anticipated, involving a short hearing in which evidence is presented by counsel in summary form, after which a jury returns an advisory verdict that forms the basis for settlement negotiations.

Two-Track Approach

Involves use of ADR processes or traditional settlement negotiations in conjunction with litigation. Representatives of the disputing parties who are not involved in the litigation are used to conduct the settlement negotiations or ADR procedure. The negotiation or ADR efforts may proceed concurrently with litigation or during an agreed-upon cessation of litigation. This approach is particularly useful in cases when: it may not be feasible to abandon litigation while the parties explore settlement possibilities; or as a practical matter, the specter of litigation must be present in order for the opposing party to consider or agree to an alternative mechanism. It is also useful when the litigation has become acrimonious or when a suggestion of settlement would be construed as a sign of weakness.